U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 July 2007

Case No. 2006-BLA-5612

In the Matter of:
J.R.M.,1
Claimant,

v.

CONSOL OF KENTUCKY, INC.,
Employer,
and
CONSOL ENERGY, INC., c/o
ACORDIA EMPLOYERS SERVICE,
Carrier,
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Joseph Wolfe, Esq.
On behalf of Claimant

Allison B. Moreman, Esq.
On behalf of Employer

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

1 Effective August 1, 2006, the Department of Labor directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site and to insert initials of such claimant/parties in the place of those proper names. In support of this policy change, DOL has adopted a rule change to 20 C.F.R. Section 725.477, eliminating a requirement that the names of the parties be included in decisions. Further, to avoid unwanted publicity of those claimants on the web, the Department has installed software that prevents entry of the claimant's full name on final decisions and related orders. This change contravenes the plain language of 5 U.S.C. 552(a)(2) (which requires the internet publication), where it states that "in ***each case*** the justification for the deletion [of identification] shall be explained fully in writing." (*emphasis added*). The language of this statute clearly prohibits a "catch all" requirement from the OALJ that identities be withheld. Even if §725.477(b) gives leeway for the OALJ to no longer publish the names of Claimants – 5 U.S.C. 552(a)(2) clearly requires that the deletion of names be made on a case by case basis.

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[2]

On April 18, 2006, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 38).[3] A formal hearing on this matter was conducted on February 21, 2007, in Prestonsburg, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES[4]

The issues in this case are:

1. Whether the Miner has pneumoconiosis as defined by the Act;

2. Whether the Miner's pneumoconiosis arose out of coal mine employment;

I also strongly object to this policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank*, 951 F. 2d 320 (11th Cir. 1992) and those collected at 27 Fed. Proc., L. Ed. Section 62:102 (Thomson/West July 2005). This change in policy rebukes the long standing legal requirement that a party's name be anonymous only in "*exceptional cases*." *See Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981), *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993), *and Frank* 951 F.2d at 323 (noting that party anonymity should be rarely granted)(*emphasis added*). As the Eleventh Circuited noted, "[t]he ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Frank*, 951 F.2d at 323.

Finally, I strongly object to the specific direction by the DOL that Administrative Law Judges have a "mind-set" to use the complainant/parties' initials if the document will appear on the DOL's website, for the reason, *inter alia*, that this is not a mere procedural change, but is a "substantive" procedural change, reflecting centuries of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge's decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial "mind-set" constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. § 725.455(b), not merely that presently contained in 20 C.F.R. § 725.477 to state such party names.

2 The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

3 In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr." refers to the transcript.

4 At the hearing, the parties stipulated to at least 29 years of coal mine employment. (Tr. 11). Additionally, Employer listed other issues that will not be decided by the undersigned; however, they are preserved for appeal. (DX 38, Item 18).

3. Whether the Miner is totally disabled; and

4. Whether the Miner's disability is due to pneumoconiosis;

(DX 38).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

J.R.M. ("Claimant") was born on May 15, 1947, and was 59 years old at the time of the hearing. (DX 2). He received his G.E.D. (DX 2). On September 7, 1968, Claimant married S.F.S., and they remain married and living together. (DX 2, 9; Tr. 15). He has no dependent children. (DX 2). Employer concedes, and I so find, that Claimant has one dependent for purposes of augmentation. (DX 38).

On his application for benefits, Claimant stated that he engaged in coal mine employment for at least 30 years. (DX 2). Claimant's last coal mine employment was as a beltman. (DX 3; Tr. 18). Claimant described the physical requirements of the work to include standing for eight hours per day, crawling 400 feet for four hours per day, and carrying up to 110 pounds. (DX 13). Claimant stated that he retired from coal mining in 2005. (DX 2; Tr. 13). He also noted on his application that he has not previously filed a federal pneumoconiosis disability claim. (DX 2).

Procedural History

Claimant filed a claim for benefits under the Act on May 31, 2005. (DX 2). On January 9, 2006, the District Director, Office of Workers' Compensation, issued a proposed decision and order – award of benefits and responsible operator. (DX 31). On January 17, 2006, Employer timely requested a formal hearing. (DX 32-33). On April 18, 2006, this matter was transferred to the Office of Administrative Law Judges. (DX 38).

Length of Coal Mine Employment

On his application, Claimant stated that he engaged in coal mine employment for at least 30 years. (DX 2). The Director determined that Claimant has at least 29 years of coal mine employment. (DX 31). The parties have also stipulated that Claimant worked at least 29 years in or around one or more coal mines. (Tr. 11). I find that the record supports this stipulation, (DX 3-7), and therefore, I hold that the Claimant worked at least 29 years in or around one or more coal mines.

Claimant's last employment was in the Commonwealth of Kentucky (DX 3); therefore, the law of the Sixth Circuit is controlling.[5]

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The District Director identified Consol of Kentucky as the putative responsible operator due to the fact that it was the last company to employ Claimant for a full year. (DX 14, 17, 19, 23). Employer does not contest its designation as responsible operator. (DX 38). Therefore, I find that Consol of Kentucky is properly designated as the responsible operator in this case.

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant selected Dr. Imitiaz Hussain to provide his Department of Labor sponsored complete pulmonary examination. (DX 8). The examination was conducted on June 29, 2005. I admit the DOL sponsored evaluations, including Dr. Smith's x-ray interpretation under § 725.406(b). I also admit Dr. Barrett's quality-only interpretation of the x-ray and Dr. Mettu's PFT validation reports under § 725.406(c).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. (CX 2). In addition to the DOL sponsored examination, Claimant designated Dr. Rasmussen's August 16,

5 Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc).

2006 x-ray interpretation and medical report.[6] He also designated the PFT from the Stone Mountain Health Clinic. This evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414(a)(3). Therefore, I admit the above designated evidence.

Employer completed a Black Lung Benefits Act Evidence Summary Form. (EX 6). Employer designated Dr. Repsher's and Dr. Jarboe's complete pulmonary evaluations and supporting depositions as initial evidence. Employer also designated Dr. Wiot's interpretation of the June 29, 2005 x-ray as rebuttal evidence. In addition, Dr. Jarboe's report included a CT scan interpretation. This evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414(a)(3). Therefore, I admit the above designated evidence. Finally, at the hearing, Employer conceded that EX 5 exceeded the limitations, but requested that it be kept in the record for appeal purposes. (Tr. 9). This report will not be considered in the instant adjudication.

X-RAYS

Exhibit	**Date of X-ray**	**Date of Reading**	**Physician / Credentials**	**Interpretation**
DX 11	06/29/05	07/01/05	Smith, BCR[7],B-reader[8]	Negative
DX 12	06/29/05	07/15/05	Barrett, BCR, B-reader	Quality Only
DX 28	06/29/05	10/15/05	Wiot, BCR, B-reader	Negative
EX 1	10/27/05	11/03/05	Jarboe, B-reader	Negative
EX 2	01/18/06	01/18/06	Repsher, B-reader	Negative
CX 1	08/16/06	08/17/06	Rasmussen, B-reader	1/0 ss

6 While Claimant did not designate Dr. Rasmussen's PFT or ABG, his medical report relies on these studies. Therefore, since Claimant has only designated one additional PFT and no ABGs I will include and consider these studies so that the full weight of Dr. Rasmussen's report may be accorded in this adjudication.

7 A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

8 A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

PULMONARY FUNCTION TESTS

Exhibit/ Date	**Co-op./ Undst./ Tracings**	**Age/ Height9**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Qualifying Results**
DX 11 06/29/05	Good/ Good/ Yes	58 73”	**1.85** **1.83***	**2.33** **2.56***	**90**	79.4 71.5	Yes10 Yes*
EX 1 10/27/05	Good/ Good/ Yes	58 72”	**2.25** 2.48*	3.08 3.24*	**45** **78***	73 76*	Yes 11 No*
EX 2 01/18/06	Good/ Good/ Yes	58 71”	**2.25** 2.37*	2.96 3.18*	**62** **77***	76 75*	Yes 12 No*
CX 1 08/16/06	Fair/ Not Listed/ Yes	59 71”	2.71 2.76*	3.68 3.68*	---- ----	74 75*	No No*
CX 3 10/06/06	Good/ Good/ Yes	59 73”	2.31	3.09	----	75	No13

*indicates post-bronchodilator values

ARTERIAL BLOOD GAS STUDIES

Exhibit	**Date**	**pCO_2**	**pO_2**	**Qualifying**
DX 11	06/29/05	42 39*	68 76*	No No*
EX 1	10/27/05	38.9*	104.4*	No* 14
EX 2	01/18/06	37.7	88.2	No
CX 1	08/16/06	40 39*	76 82*	No No*

* indicates post-exercise values

9 The factfinder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). Dr. Knight testified that it is typical for his office to measure height wearing shoes. (DX 10). Therefore, giving more weight to the findings by the other physicians of record, I find Claimant’s height to be 72 inches.

10 On August 1, 2005, Dr. Mettu, an internist and pulmonologist, concluded that there were an insufficient number of tracings without an explanation for the deficiency. (DX 11). On August 16, 2005, however, he submitted a supplemental report in which he determined that the vents were acceptable. Dr. Repsher opined that the results of this study are uninterpretable due to vocal chord dysfunction syndrome. (EX 3).

11 Dr. Jarboe reported that Claimant’s effort was poor. As a result, both the pre and post-bronchodilator FEV1 was not within ATS standards. Dr. Repsher also opined that the results of this study are uninterpretable due to vocal chord dysfunction syndrome. (EX 3).

12 Dr. Repsher opined that the results of this study are uninterpretable due to vocal chord dysfunction syndrome. (EX 3).

13 Dr. Jarboe concluded that this study was not valid because the time volume curves show a lack of optimal effort. (EX 4).

14 This study had to be discontinued due to significant hypertension.

Narrative Reports

Dr. Imtiaz Hussain examined Claimant on June 29, 2005. (DX 11). Dr. Hussain considered the following: symptomatology (sputum, wheezing, dyspnea, and cough), employment history (34 years of coal mine employment), individual history (arthritis and high blood pressure), family history (high blood pressure and heart disease), smoking history (two years at one pack per week), physical examination (bilateral rhonchi), chest x-ray (normal), PFT (obstructive ventilatory defect), ABG (hypoxemia), and an EKG (ST and T wave abnormalities). Dr. Hussain diagnosed clinical pneumoconiosis and hypertension. He opined that 34 years of coal dust exposure was the etiology of Claimant's extreme pulmonary function abnormality and hypoxemia. In addition, he stated that the impairment was moderate and 100% the result of coal mine employment. Thus, Dr. Hussain concluded that Claimant is unable to perform all the physical requirements of his coal mine work.

Dr. Thomas Jarboe, an internist, pulmonologist, and B-reader, examined Claimant on October 27, 2005 and submitted a report dated November 3, 2005. (EX 1). Dr. Jarboe considered the following: symptomatology (chest pain, coughing, mucous production, wheezing, and shortness of breath), employment history (29 years coal mine employment, last working on the belt lines), individual history (high blood pressure), smoking history (no smoking since high school), physical examination (respirations were quiet and unlabored with good air entry and no rales or wheezes), chest x-ray (0/0), PFT (invalid but shows mild restriction but no obstruction), ABG (completely normal), and a CT scan (no evidence of CWP). Dr. Jarboe diagnosed probable bronchial asthma, but he found insufficient objective evidence to justify a diagnosis of clinical or legal CWP. He stated that even though the PFT was invalid, there was no evidence of obstruction, and it cannot be said with reasonable certainty whether Claimant has any true restriction. Dr. Jarboe also opined that if Claimant has restrictive disease, it is likely caused by his significant abdominal obesity. He then explained how the test results support this conclusion. Finally, while Dr. Jarboe stated that it was not possible to determine whether Claimant had a pulmonary or respiratory impairment because of the invalid PFT, since the FVC and FEV1 values exceed the Federal limits, and since the ABG values were normal, he opined that Claimant was not totally disabled from a pulmonary standpoint.

Dr. Jarboe was deposed by the Employer on February 8, 2007, when he repeated the findings of his earlier written report. (EX 4). In addition, he considered the other medical evidence of record prior to the deposition. Although he found his PFT invalid, he reported that Dr. Rasmussen's test showed a similar very mild restriction. He also added that the PFT studies of record show a great deal of variability, which he opined could either be caused by variable effort or could be the result of a reversible airway disease or asthma. Either way, he concluded that these results are inconsistent with the fixed impairment typically caused by CWP. Dr. Jarboe also concluded that the ABGs revealed a similar variability. Based on this evidence, Dr. Jarboe concluded that Claimant has a mild, non-disabling pulmonary impairment, and that from a respiratory standpoint, he could return to the exertional requirements of his previous coal mine position. He added that this opinion would remain the same even if it was found that Claimant suffered from CWP.

Dr. Lawrence Repsher, an internist, pulmonologist, and B-reader, examined Claimant on January 7, 2006 and submitted a report dated February 7, 2006. (EX 2). Dr. Repsher considered the following: symptomatology (shortness of breath, progressive dyspnea on exertion, productive cough, chest pain, and GERD), employment history (31 years, last working as a beltman in 2005), individual history (high blood pressure), family history (hypertension, black lung, myocardial infarction, and hypertension), smoking history (two to three cigarettes per day in 1977 and 1978), physical examination (breath sounds normal), chest x-ray (0/0), PFT (uninterpretable due to vocal chord dysfunction syndrome, but the diffusing capacity is unequivocally normal), ABG (normal), and an EKG scan (suggestive of myocardial ischemia). Dr. Repsher diagnosed hypertension, symptoms of coronary artery disease, congestive heart failure, peripheral vascular disease, and a history of hemochromatosis. Dr. Repsher, however, found no evidence of medical or legal CWP, and no evidence of any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment as a coal miner with exposure to coal mine dust. He explained that the neither the x-ray, PFT, or ABG, showed evidence of CWP. Finally, he stated that Claimant's other potentially serious diseases cannot be attributed to coal dust exposure.

Dr. Repsher was deposed by the Employer on June 29, 2006, when he repeated the findings of his earlier written report. (EX 3). In addition to his previous report, Dr. Repsher considered Drs. Jarboe, Wiot, and Hussain's reports in preparation for the deposition. He noted that Drs. Jarboe and Hussain's reports were equally uninterpretable due to Claimant's vocal chord dysfunction. However, he reiterated that despite these deficiencies, the PFTs do not establish total disability because the diffusing capacity was unequivocally normal. Dr. Repsher also noted that the ABG studies were unequivocally normal at rest. As a result, Dr. Repsher concluded that Claimant does not have any measurable impairment of lung function. Dr. Repsher concluded that the x-ray and CT scan evidence rule out the possibility of clinical pneumoconiosis, but based on the deficient PFT, it is not possible to rule out histologic CWP. However, even if Claimant actually has histologic CWP, Dr. Repsher opined that the normal to supernormal diffusing capacity ruled out the presence of pulmonary impairment.

Dr. Rasmussen, a B-reader, examined Claimant on August 16, 2006. (CX 1). Dr. Rasmussen considered the following: symptomatology (shortness of breath with exertion, chronic productive cough, chest discomfort, and wheezing at night), employment history (32 to 33 years, last performing heavy manual labor), individual history (hypertension), family history (hypertension, heart disease, emphysema, and black lung), smoking history (minimal), physical examination (chest expansion diminished, breath sounds normal, no rales, rhonchi, or wheezes), chest x-ray (1/0), PFT (minimal, irreversible obstructive ventilatory impairment), ABG (normal resting values), and an EKG (normal). Dr. Rasmussen diagnosed clinical pneumoconiosis based on length of coal dust exposure and the x-ray results. He opined that the resultant impairment was mild, but he concluded that this impairment was not disabling.

Smoking History

Claimant testified that he smoked for two years during high school, and that he currently chews tobacco. (Tr. 16). Dr. Hussain reported that Claimant smoked one pack per week from 1968 until 1970. (DX 11). Dr. Rasmussen stated that Claimant never smoked regularly. (CX 1).

Dr. Jarboe reported that Claimant has not smoked since high school. (EX 1). Dr. Repsher reported that Claimant smoked two to three cigarettes per week for two years in the late 1970s. (EX 2). I find that the amounts Claimant reported to the physicians is generally consistent with his testimony. Therefore, I find that Claimant smoked one pack of cigarettes per week for two years.

DISCUSSION AND APPLICABLE LAW

This claim was filed after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section; and

2. Has met the requirements for entitlement to benefits by establishing that he:

   (i) Has pneumoconiosis (see § 718.202), and

   (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

   (iii) Is totally disabled (see § 718.204(c)), and

   (iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

2. 3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that

> deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

Sections 718.201(a-c).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). I may also assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989). In *Roberts v. Bethlehem Mines Corp*., 8 B.L.R. 1-211, 1-213 n. 5 (1985), however, the Board stated that it "takes official notice that the qualifications of a certified radiologist are at least comparable if not superior to a physician certified as a reader pursuant to 42 C.F.R. §37.51 …." Finally, if the film quality is "poor" or "unreadable," then the study may be given little weight. *Gober v. Reading Anthracite Co.*, 12 B.L.R. 1-67 (1988).

The record contains five interpretations of four chest x-rays, and one quality-only interpretation. Drs. Smith and Wiot, both radiologists and B-readers, interpreted the June 29, 2005 x-ray as negative for pneumoconiosis. There were no positive readings. Therefore, I find this film to be negative.

Dr. Jarboe, a B-reader, read the October 27, 2005 film as negative. There were no positive readings. Therefore, I find this film to be negative.

Dr. Repsher, a B-reader, interpreted the January 18, 2006 x-ray to be negative. There were no positive readings. Therefore, I find this film to be negative.

Dr. Rasmussen, a B-reader, read the August 16, 2006 film as positive for pneumoconiosis. There were no negative readings. Therefore, I find this film to be positive.

I have determined that three of the four x-rays are negative for pneumoconiosis. In addition, all of the dually credentialed interpretations are negative for pneumoconiosis. On the other hand, I have found that the most recent B-reading is positive for the disease. Even though pneumoconiosis is a progressive disease, and I found that Dr. Rasmussen's B-reading is positive, there is not a sufficient lapse of time between the oldest and latest x-ray to discount all the prior readings. Therefore, I find that Claimant has not established the presence of pneumoconiosis by a preponderance of the evidence under subsection (a)(1).

Arising out of Coal Mine Employment

If a miner suffers from pneumoconiosis and was employed ten years or more in the Nation's coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b); *Stark v. Director,* OWCP, 9 B.L.R. 1-36 (1986); *Hucker v. Consolidation Coal Co.,* 9 B.L.R. 1-137 (1986). As I have found that Claimant established twenty-nine years of coal mine employment, if I had found that he suffered from pneumoconiosis, he would be entitled to the rebuttable presumption set forth in § 718.203(b) that his pneumoconiosis arose out of his coal mine employment. However, I have found that Claimant does not have pneumoconiosis. Because there is no pneumoconiosis, I find there is no causation.

Total Disability

To be entitled to benefits under the Act, Claimant must also demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under § 718.204(b), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.,* 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

I have determined that Claimant has not established that he suffers from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. The June 29, 2005 pre and post-bronchodilator studies and the October 27, 2005 and January 18, 2006 pre-bronchodilator PFTs qualify Claimant as totally disabled under the regulatory tables. On the other hand, the October 27, 2005 and January 18, 2006 post-bronchodilator PFTs, the August 16, 2006 pre and post-bronchodilator studies, and the October 6, 2006 pre-bronchodilator study are all above the values found in Appendix B of Part 718. Stated another way, while three of the five pre-bronchodilator studies qualify Claimant as totally

disabled, only one of the four post-bronchodilator studies qualify Claimant as totally disabled. In addition, the two most recent PFTs demonstrated non-qualifying values.

In *Coleman v. Ramey Coal Co*., 18 B.L.R. 1-9 (1993), the Board held that more weight may be accorded to the results of a recent ventilatory study over the results of an earlier study. Based on *Coleman*, I find that the most recent PFTs are the most probative. As a result, I find that the most probative PFT evidence is non-qualifying under the tables found in Appendix B of Part 718. Furthermore, if I exclude from consideration all of the PFT values that have been invalidated by a physician, leaving only the August 16, 2006 study, then the PFT evidence is unanimously non-qualifying. Therefore, I find that Claimant has not established total disability under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) if the results of arterial blood gas studies meet the requirements listed in the tables found at Appendix C to Part 718. None of the ABG evidence of record produced values that meet the requirements of the tables found at Appendix C to Part 718. Therefore, I find that Claimant has not established total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has not established the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment.

In assessing total disability, the administrative law judge is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Claimant's usual coal mine employment as a welder and beltman involved standing for eight hours per day, crawling 400 feet for four hours per day, and carrying up to 110 pounds. (DX 13).

Based on a qualifying PFT, a non-qualifying ABG, and a physical examination, Dr. Hussain concluded that Claimant was totally disabled from performing the exertional requirements of his previous coal mine employment. The objective evidence he cited as a basis for his opinions adequately supported his conclusion, and thus, I find Dr. Hussain's opinion to be well-reasoned and well-documented. Therefore, I accord Dr. Hussain's opinion probative weight.

Based on qualifying pre-bronchodilator PFTs, non-qualifying post-bronchodilator PFTs, non-qualifying ABGs, and physical examinations, Drs. Jarboe and Repsher concluded that Claimant was not totally disabled from a pulmonary standpoint from performing the exertional requirements of his previous coal mining position. I find that objective evidence considered by these physicians adequately supports their conclusions, and thus, I find their opinions to be well-reasoned and well-documented. In addition, I note that Drs. Jarboe and Repsher are both internists and pulmonologists. Therefore, bolstered by their advanced credentials and the fact that the PFTs they considered are more recent than the study reviewed by Dr. Hussain, I find that their opinions are entitled to substantial probative weight.

In opining Claimant was not totally disabled, Dr. Rasmussen considered the most recent PFT, which showed pre and post-bronchodilator non-qualifying values, a non-qualifying ABG, and a physical examination. A medical report containing the most recent physical examination of the miner may be properly accorded greater weight as it is likely to contain a more accurate evaluation of the miner's current condition. *Gillespie v. Badger Coal Co.*, 7 B.L.R. 1-839 (1985). As his opinion is based on the objective data he considered, I find his conclusions to be well-reasoned and documented. Furthermore, even though his credentials are not included in the record, I find that his disability diagnosis is supported by the reports and depositions of both Dr. Repsher and Dr. Jarboe. Therefore, bolstered by the fact that he considered the most recent objective evidence, I accord his opinion substantial probative weight.

Dr. Hussain concluded that Claimant was totally disabled from a pulmonary standpoint. On the other hand, Drs. Repsher, Jarboe, and Rasmussen all concluded that Claimant was not totally disabled. While I have found all four of these opinions to be well-reasoned and well-documented, I have added additional weight to the opinions by Drs. Repsher, Jarboe, and Rasmussen based on the recency of the evidence they considered. Therefore, upon consideration of all of the evidence of total pulmonary disability, I find that the preponderance of the evidence does not support a finding of total disability under § 718.204(b)(2)(iv).

Claimant has not established that he is totally disabled under subsection (b)(2)(i)-(iv). Upon weighing all evidence concerning total disability under §718.204 (b)(2), I find that Claimant is not totally disabled from a pulmonary standpoint. Therefore, I find that Claimant has not established that he is totally disabled due to pneumoconiosis.

Entitlement

Claimant has not established that he has pneumoconiosis arising out of coal mine employment, and he has not established that he is totally disabled by pneumoconiosis. Therefore, Claimant is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of J.R.M. for benefits under the Act is hereby DENIED.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).